

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LEOTA HURD,

No. C 02-5739 JL

Plaintiff,

v.

**ORDER DENYING MOTION FOR  
SUMMARY JUDGMENT  
Docket # 21**

RAMONA LAND COMPANY, ET AL.,

Defendants.

**Introduction**

The motion of Defendant Consolidated Real Estate Management, Inc. for summary judgment came on for hearing before this Court on November 5, 2003. Attorney for Plaintiff Leota Hurd was D. Scott Chang. Attorney for Defendant was Steven Ruth. The Court considered the written pleadings and the oral argument of counsel and hereby denies the motion. All parties have consented to the jurisdiction of this Court as required by 28 U.S.C. §636(c)

**Factual Background**

Plaintiff Leota Hurd is a 72 year old woman with multiple disabilities, including mobility impairments, respiratory problems, arthritis and high blood pressure. She has difficulty walking without a walker and sometimes uses a wheelchair. (Decl. Of Leota Hurd at 1). She moved into her apartment on the third floor of the Royal Oaks Apartments in October 1999. At

1 that time the building elevator was working. Otherwise she must climb two flights of stairs to  
2 reach her apartment. In July 2001, when new owners took over the Royal Oaks Apartments,  
3 the elevator was locked and she was not given a key. Between July 2001 and January 2002  
4 on three or four different occasions she asked Jack Rose, the resident manager, to repair the  
5 elevator. She asked him in person while she was using her walker. Mr. Rose told her a part  
6 had been ordered and the elevator would be repaired. The elevator was not repaired until  
7 after this lawsuit was filed.

8 From July 2001 to January 2002, Ms. Hurd also witnessed her care giver write notes  
9 on her behalf asking that the elevator be repaired. The notes stated that she had a disability,  
10 she needed an elevator to reach her apartment safely, and that she requested the Royal Oaks  
11 Apartments to repair the elevator. Her attendant forwarded the notes with her monthly rent  
12 checks. She never received a response to her written requests that the elevator be repaired.

13 Also, since July 2001 she has seen homeless persons and drug dealers at Royal Oaks  
14 Apartments. She has heard of problems with assaults, burglaries, and prostitution on the  
15 premises. She believes that Royal Oaks Apartments has not provided her with adequate  
16 security.

17 On December 9, 2003, she filed her complaint alleging violation of fair housing and  
18 disabled access laws. She seeks injunctive, declaratory and monetary relief against  
19 defendants - - the owners and managers of the Royal Oaks Apartments.

20 Defendant Consolidated Real Estate Management, Inc., which manages the  
21 apartments moves for summary judgement on Plaintiff's claims for relief under the Federal  
22 Fair Housing Act, the California Fair Employment and Housing Act ("FEHA"), the Unruh Civil  
23 Rights Act, disabled access, common law nuisance and California Business and Professions  
24 Code §17200.

### 25 Legal Analysis

26 Consolidated moves for summary judgement on the following grounds:

- 27 1) As to Claim One, Violation of 42 U.S.C. §3601, the Federal Fair Housing Act,  
28 Plaintiff presents no evidence that Consolidated intentionally discriminated

1 against her. Nor did Consolidated's conduct give rise to a discriminatory effect.

2 Consolidated relies on *Martin v. Constance*, 843 F.Supp. 1321 (E.D. Mo.1994)

3 Plaintiff rejects the contention that she must prove that Consolidated intentionally  
4 discriminated in order to prevail on a claim for violation of the reasonable accommodation  
5 provision of the Fair Housing Act. She relies on *Fowler v. Borough of Westville*, 97 F.Supp.2d  
6 602, 613 (D.N.J. 2000); *Trovato v. City of Manchester*, 992 F.Supp.493, 497 (D.N.H. 1997);  
7 *Dunlap v. Association of Bay Area Governments*, 996 F.Supp. 962, 966 (N.D.Cal. 1998).  
8 She contends that she has several theories available to her and that a claim for discrimination  
9 based on a failure reasonably to accommodate is distinct from a claim of discrimination  
10 based on disparate impact. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 276 (2d Cir. 2003).

11 Plaintiff distinguishes *Martin v. Constance* as follows:

12 A plaintiff can show a violation of section 3604(f) by one of two methods. The first  
13 method is showing discriminatory intent on the part of the Defendants. . .

14 Although the Court concludes that plaintiffs have proved a violation of the FHA by  
15 showing discriminatory intent, the Court will consider whether plaintiffs have also  
16 succeeded on the merits by proving discriminatory effect. Under this method of  
17 establishing a violation of section 3604, plaintiffs "need prove no more than that the  
conduct of Defendants actually or predictably resulted in ... discrimination; in other  
words, that it has a discriminatory effect.... Effect, and not motivation, is the  
touchstone."

18 843 F.Supp. at 1325 (citations omitted).

19 This Court concludes that Plaintiff may prove discrimination by Consolidated without  
20 proving intent, if she can prove a discriminatory effect from this Defendant's acts or failure to  
21 act. Either theory presents an issue of fact to be decided by the jury, and accordingly summary  
22 judgment is denied as to Claim One, for violation of the Fair Housing Act.

23  
24 2) As to Claim Two, Violation of the California Fair Employment and Housing  
25 Act ("FEHA"), Consolidated is not the proper Defendant.

26 Defendant's also contends that:

27 3) As an employee, Consolidated cannot be personally liable for housing  
28 discrimination under FEHA, based on management decisions made in the

1 course of employment. Defendant relies on *Janken v. GM Hughes Electronics*  
2 (1996) 46 Cal.App. 4<sup>th</sup> 55.

3 In *Janken*, the court ruled that a supervisor could be held personally liable for a  
4 discriminatory employment action, if it was within the supervisor's authority and was in fact  
5 discriminatory. This Court interprets *Janken* to mean that Consolidated could be liable for  
6 discrimination under FEHA, if it discriminated against Plaintiff while acting within its authority.

7 Consolidated moves for summary judgment on Claim Two on the additional ground  
8 that:

9 4) There is no evidence that Consolidated intentionally discriminated against  
10 Plaintiff, so her FEHA claim must fail. Defendant relies on Gov. Code  
11 §12955.8(a). This statute allows two kinds of proof of discrimination: by  
12 discriminatory intent or discriminatory effect

13 Proof of an intentional violation of this article includes, but is not limited to, an act or  
14 failure to act that is otherwise covered by this part, that demonstrates an intent to  
15 discriminate in any manner in violation of this part. A person intends to discriminate if  
16 race, color, religion, sex, sexual orientation, familial status, marital status, disability,  
17 national origin, or ancestry is a motivating factor in committing a discriminatory housing  
18 practice even though other factors may have also motivated the practice. An intent to  
19 discriminate may be established by direct or circumstantial evidence.

20 (b) Proof of a violation causing a discriminatory effect is shown if an act or failure to act  
21 that is otherwise covered by this part, and that has the effect, regardless of intent, of  
22 unlawfully discriminating on the basis of race, color, religion, sex, sexual orientation,  
23 familial status, marital status, disability, national origin, or ancestry. A business  
24 establishment whose action or inaction has an unintended discriminatory effect shall  
25 not be considered to have committed an unlawful housing practice in violation of this  
26 part if the business establishment can establish that the action or inaction is necessary  
27 to the operation of the business and effectively carries out the significant business  
28 need it is alleged to serve. In cases that do not involve a business establishment, the  
person whose action or inaction has an unintended discriminatory effect shall not be  
considered to have committed an unlawful housing practice in violation of this part if the  
person can establish that the action or inaction is necessary to achieve an important  
purpose sufficiently compelling to override the discriminatory effect and effectively  
carries out the purpose it is alleged to serve.

CA GOVT § 12955.8

As with Claim One, Plaintiff has two options: she can show either discriminatory intent  
or discriminatory effect and either to prevail.

1 This Court finds that there are issues of fact as to whether Consolidated intentionally  
2 discriminated or, even if it didn't, whether any action or inaction by this Defendant had a  
3 discriminatory effect on Plaintiff. There would also be issues of fact whether the action or  
4 inaction was necessary to achieve an important purpose. Therefore, summary judgement is  
5 denied as to Claim Two, for violation of FEHA.

6 5) Consolidated moves for summary judgment on Plaintiff's Claim Three, for  
7 relief under California Civil Code §51, et seq., (Unruh Civil Rights Act), on  
8 grounds that there is no evidence that Consolidated intentionally discriminated  
9 against Plaintiff. Consolidated relies on *Harris v. Capital Growth Investors XIV*  
10 (1991) 52 Cal. 3d 1142, 1174-1175.

11 Plaintiff counters that the Unruh Act does not require a showing of intent to prove a  
12 violation of its disability provisions. She relies on *Presta v. Peninsula Corridor Joint Powers*  
13 *Bd.*, 16 F.Supp.2d 1134 (N.D.Cal. 1998) (holding that the Unruh Act incorporates liability  
14 standards of ADA, which prohibits more than intentional discrimination; for instance  
15 discrimination resulting from "inaction, thoughtlessness or equal treatment when particular  
16 accommodations are necessary.") *Id.*, citing *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9<sup>th</sup>  
17 Cir. 1996); *Boemio v. Love's Restaurant*, 954 F.Supp. 204, 208 n. 4 (S.D.Cal. 1997).

18 Plaintiff distinguishes *Harris*, upon which Consolidated relies, because *Harris* involved  
19 claims of sex discrimination, not disability discrimination, and was decided before the Unruh  
20 Act was amended to include disability as a protected class and incorporate the provisions of  
21 the ADA.

22 This Court agrees that the *Harris* case is inapposite and adopts the reasoning in  
23 *Presta* in which Judge Henderson ruled that a plaintiff bringing a disability discrimination  
24 action under California's Unruh Civil Rights Act need not prove discriminatory intent. *Presta Id.*  
25 at 1135 (holding that Unruh Act "adopts the full expanse of the ADA" and therefore the same  
26 standard of liability applies, and plaintiff need not prove discriminatory intent).

1 Accordingly, summary judgment on Claim Three, for violation of the Unruh Civil Rights  
2 Act, must be denied.

3 6) Defendant moves for summary judgment on Plaintiff's Claim Four, for relief  
4 under California Civil Code §54.1, on grounds that Consolidated never refused  
5 Plaintiff access to an elevator. Defendant relies on its allegation that it had no  
6 knowledge of Plaintiff's disability.

7 Plaintiff contends that Consolidated had imputed knowledge of Plaintiff's disability  
8 through its agent, the resident manager. She relies on *Meyer v. Holley*, 537 U.S. 280, 123  
9 S.Ct. 824, 829 (2003).

10 *Meyer* relieves owners and shareholders of corporate defendants from liability for acts  
11 of their employee or agent, but not the corporations themselves. *Id.* at 827. Plaintiff argues  
12 that Consolidated, the corporation, had implied knowledge of her disability through its  
13 employee, the resident manager of the Royal Oaks Apartments.

14 This Court finds that summary judgment should be denied on Plaintiff's claim under  
15 California Civil Code §54.1, for denial of access, because there are issues of fact as to the  
16 extent of the agency relationship between Consolidated and the resident manager.

17 5) Consolidated moves for summary judgment on Claim Five, for relief under  
18 Calif. Bus. & Prof. Code § 17200. Defendant contends that it is an improper  
19 defendant, had no knowledge either of Plaintiff's disability or of her request for  
20 an elevator, and had no authority to install or repair the elevator.

21 Plaintiff contends that a property manager may be liable for failure to make reasonable  
22 accommodations. She relies on *Wilstein v. San Tropai Condominium Master Assoc.*, 1999  
23 U.S. Dist. Lexis 7031, \*22 (N.D.Ill. 1999) (property manager who ignored requests of  
24 condominium complex resident for accessible parking space independently liable for  
25 violation of reasonable accommodation provision of Fair Housing Act, despite claim by  
26 property manager and building manager that they were merely agents of the homeowner's  
27 association).

Plaintiff also contends that Consolidated is an agent of the property owner and may also be liable as such for failure to reasonably accommodate Plaintiff's disability by repairing the elevator. *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096 (7<sup>th</sup> Cir. 1992), *cert denied*, 508 U.S. 972 (1993) (Real estate agents liable individually for engaging in racial steering); *Dillon v. AFBIC Development Corp.*, 597 F.2d 556 (5<sup>th</sup> Cir. 1979) (builder's agent liable for discrimination under Fair Housing Act for following builder's instructions not to sell to plaintiffs because of their race); *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1120 (7<sup>th</sup> Cir. 1974) (Rental management company liable for Fair Housing violations).

Plaintiff notes cases in which actions against property managers under the Fair Housing Act have been allowed to proceed. *See, e.g. Hamad v Woodcrest Condominium Assoc.*, 328 F.3d 224, 228 (6<sup>th</sup> Cir. 2003); *Walker v. Crigler*, 976 F.2d 900, 902 (4<sup>th</sup> Cir. 1992). Plaintiff contends that acts of unfair competition include violations of fair housing laws. *People v. McKale* (1979) 25 Cal.3d 626, 637.

In *Wilstein* the Seventh Circuit expressly held that an owner may be liable for a manager's actions. Defendant's motion is denied as to this claim.

6) Consolidated moves for summary judgment on Plaintiff's Claim Six, negligent supervision, on the basis that there is no evidence that Consolidated had knowledge that any of its employees would act improperly without supervision. Consolidated relies on *Juarez v. Boy Scouts of America*, (2000) 81 Cal. App. 4<sup>th</sup> 377, 395; *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207; *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 664.

Plaintiff contends that whether or not Consolidated was negligent is a question of fact to be decided by a jury. Plaintiff has not had an opportunity to take depositions or follow up on her written discovery. *See Rule 56(f) Declaration*. Specifically, Plaintiff has not been able to discover what training the resident managers at the Royal Oaks Apartments received, what experience the resident managers have in property management, and what level of

1 supervision was provided the resident managers of the apartments during the relevant time  
2 period. *Id.*

3 This Court agrees that there are triable issues of fact which require discovery which  
4 Plaintiff has not yet obtained, and, therefore, Consolidated's motion for summary judgment on  
5 Claim Six is denied.

6 7) Consolidated moves for summary judgment on Plaintiff's Claim Seven, under  
7 California Civil Code § 3479 and common law nuisance, on grounds that there  
8 is no evidence that Consolidated had authority to accommodate Plaintiff,  
9 because it was never the owner of the Royal Oaks Apartments. Defendant  
10 relies on *Jarchow v. Transamerica Title Insurance Co.* (1975) 48 Cal.App.3d  
11 917, 949.

12 Plaintiff contends that summary judgment on this issue would be premature and that  
13 agents of a landlord may be liable for nuisance. Plaintiff relies on *Stoiber v. Honeychuck*,  
14 (1980) 101 Cal.App.3d 903, 919 (finding that "the statutory definition of nuisance appears to  
15 be broad enough to encompass almost any conceivable interference with the enjoyment or  
16 use of land.")

17 Plaintiff observes that Consolidated offers evidence that it did not have authority to  
18 repair the security gates, but does not state that it did not have responsibility for maintaining  
19 security. Plaintiff has not had an opportunity to discover whether Consolidated had  
20 responsibility to ensure security at Royal Oaks Apartments and if so, what means it employed  
21 to ensure residents' security without repairing the security gates. *See Rule 56(f) Declaration.*

22 This Court finds that there are material issues of fact in dispute which include  
23 Consolidated's responsibility for security and its ability to provide security, and that therefore  
24 summary judgment on the nuisance claim must be denied.  
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### 26 Conclusion

27 For all the above reasons, the Court hereby denies Consolidated's motion for summary  
28 judgment on the following claims:



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- Claim One, for relief under 42 U.S.C. § 3601, the Federal Fair Housing Act;
- Claim Two, for relief for violation of the California Fair Employment and Housing Act ("FEHA");
- Claim Three, for relief under California Civil Code §51, et seq. (Unruh Civil Rights Act)
- Claim Four, for relief under California Civil Code § 54.1 (disabled access to housing);
- Claim Five, for relief under California Business & Professions Code § 17200;
- Claim Six, for relief for negligent supervision;
- Claim Seven, for relief under Civil Code § 3479 and common law nuisance.

IT IS SO ORDERED.

DATED: November 12, 2003

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James Larson  
United States Magistrate Judge